82-2048

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JERRY MEEKER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Statutes of Limitations, such as 18 U.S.C. § 3282, are jurisdictional in federal criminal cases.

2. Whether a defense based upon the prior expiration of the Statute of Limitations can be waived by the defendant.

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Petitioner, Jerry Meeker, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered March 3, 1983, affirming his conviction under 18 U.S.C. §§ 371, 1001 and 1341, and that on hearing the judgment of conviction be reversed.

Opinions Below

The opinion of the Court of Appeals is reported at 701 F. 2d 685 (1983) and is reproduced in the appendix herein.

Jurisdiction

The judgment of the Court of Appeals was entered on March 3, 1983.

A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied April 13, 1983.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory Provision Involved

18 U.S.C. § 3282.

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

Appellant-defendant Meeker ("Meeker") was indicted, along with Nicholas L. Dennis, by the federal grand jury for the District of Colorado on October 21, 1981. The 43 count indictment charged one count of conspiracy, 18 U.S.C. § 371, thirteen counts of false statements, 18 U.S.C. §§ 1001 and twenty-nine mail fraud counts, 18 U.S.C. §§ 1341 and 2. Both defendants filed motions pursuant to Federal Rule of Criminal Procedure 21(b), after which the matter was transferred to the North District of Illinois, Eastern Division.

On January 29, 1982, the District Court granted the government's oral motion to dismiss counts 15 through 20 of the indictment.

Meeker filed pretrial motions to dismiss due to statute of limitations and breach of agreement, as well as other motions. After Meeker's motion for ruling, the District Court denied these motions.

Jury selection commenced on April 5, 1982. The case was submitted to the jury on April 19, 1982, with a verdict being returned on April 21, 1982.

Dennis was found not guilty of all counts. Meeker was found guilty of all counts.

Meeker filed motions for judgment of acquittal or, in the alternative, for a new trial and an arrest of judgment. Both motions were denied by the District Court on June 25, 1982 with judgment and sentence being entered on that date.

Meeker was sentenced to three years on each count to run concurrently.

During the course of the government's preindictment investigation, Meeker was requested by the government to execute two waivers of the Statute of Limitations. He executed both waivers. The second waiver provided that

> "This Agreement supercedes all prior agreements and waivers and shall be void if not executed by an authorized representative of Justice and a duplicate original returned to Meeker's attorney on or before October 1, 1981."

It is uncontested that Justice never complied with the foregoing terms. In the trial court, the government conceded that the purported waiver was picked up and placed in an investigative file.

The trial court held, in essence, that prior portions of the Agreement were complied with and thus Appellant was

bound by his waiver, even though there was an "administrative oversight." The Court went on to describe the requirements of the foregoing paragraph as pertaining to a "ministerial act" which "[t]he government should have performed . . . without any question."

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case because of a clear disagreement between the Circuit Courts of Appeals on the question of whether or not the Statute of Limitations in a federal criminal case may be waived. The recurring nature of the question reflects that a basic tenet of justice is left subject to more than one interpretation in the absence of a pronouncement by this Court.

The Tenth Circuit, in the case of *Waters* v. *United States*, 328 F. 2d 739, 743 (10th Cir. 1964), characterized the Statute of Limitations as ". . . a limitation upon the power of the sovereign to act against the accused," and concluded it was jurisdictional and could be raised at any stage of the proceedings.

However, the Seventh Circuit, in the present case, found that a defense based on the Statute of Limitations is non-jurisdictional and can be waived.

I.

THE FEDERAL COURTS OF APPEALS ARE IN DISAGREEMENT REGARDING THE NATURE OF A DEFENSE BASED UPON THE STATUTE OF LIMITATIONS.

Introduction

Meeker was indicted by the grand jury for the District of Colorado on October 21, 1981. Counts 2 through 14 and

21 charge offenses occurring more than five years prior to the date of indictment. There is no assertion that any statutory exceptions to the five year limitation of 18 U.S.C. § 3282 are applicable to Meeker.

The district court found that Meeker effectively waived the statute of limitations and was thereby amenable to prosecution and conviction of various counts otherwise barred.

Considered in this section is the proposition that the statute of limitations in criminal cases is jurisdictional and, as such, nonwaivable.

The states ascribe to the proposition that the statute of limitations is jurisdictional, whereby those federal circuits which have ruled on the issue are divided, with the majority holding contrary to the states' position.

Historical Perspective

Virtually all of the modern decisions on whether the statute of limitations is jurisdictional find their genesis in *United States* v. *Cook*, 84 U.S. (17 Wall..) 168 (1872). In order to place this ruling in perspective, it is necessary to consider the development of the issue which led to that decision.

In *United States* v. *Watkins*, 28 F. Cas. 419, 470 (C.C.D.C. 1829) (No. 16,649), Chief Justice Cranch, after reviewing the applicable authority, held that the trial court had no jurisdiction to consider an indictment which was barred by the statute of limitations. Procedurally, the issue was raised by way of demurrer to the indictment.

The government apparently did not even contest whether or not the statute of limitations was jurisdictional. Rather, at issue was the procedure used to raise the question. If

raised by demurrer, the government could not adduce evidence of the defendant's flight as an exception to the statutory terms. However, Chief Justice Cranch ruled that the government was bound by the language of the indictment, and thus could not adduce such evidence at trial.

Eight years later, the defendant's timing in raising the statute of limitations issue was held to be determinative of whether the government would be allowed to offer evidence on the issue. The issue was an "absolute bar" if raised by demurrer; but during trial, it becomes a "prima facie bar" to the prosecution. At trial, the government may submit evidence of flight. *United States* v. *White*, 28 F. Cas. 568, 569 (C.C.D.C. 1837) (No. 16,677).

In 1837, once an indictment was returned, the defendant possessed the absolute discretion as to whether the government would have an opportunity to prove that an exception of the statute of limitation existed. This discretion was exercised by either demurrer to the indictment, or proceeding to trial on the general issue.

The Court in *White, supra,* spoke of "bar" and "defense" in the same paragraph. The two were not mutually exclusive, and "defense" did not refer only to jurisdictional issues.

The general rule in federal courts during the period was that the statute of limitations was a bar to prosecution. *United States* v. *Ballard*, 24 F. Cas. 972 (C.C.D. Mich. 1844) (No. 14507), *Parsons* v. *Hunter*, 18 F. Cas. 1259 (C.C.D. N.H. 1836) (No. 10,778).

Story, J., in *Parsons, supra* at 1261-2, raised the statute of limitations issue for the first time on appeal, and stated that it may be considered under the general issues rather than being specifically pleaded.

Generally, the matter of a court's jurisdiction was considered to be a matter of defense which was raised under the general issue. *Fitch* v. *Commonwealth,* 92 Va. 834, 24 S.E. 272 (1896), *Bennett* v. *State,* 31 Tenn. 411 (1852).

In considering a jurisdictional issue, the court in *Bennett, supra,* at 412, stated that ". . . no act, omission, or consent on the part of the prisoner could confer jurisdiction [under these facts]."

French v. *Lafayette Ins. Co.,* 9 F. Cas. 788 (C.C.D. Ind. (1883) (No. 5,102) *aff'd. on other grounds* 59 U.S. 404 (1855) considered a contract for insurance which specifically limited to six months the time within which suit could be initiated. In rejecting this contractual provision, the court stated:

> The time specified in the statute of limitations is as much a part of the policy of the law as the act itself. It is a matter of law, and cannot be changed by the contract of the parties. If they may shorten the time expressed in the act, they may extend it; or they may, by this agreement, annul it. This, it appears to me, they cannot do. It would be a dangerous power. The law was not made for particular cases, but it is founded in a general policy, and applies equally to all contracts, as specified in the act.

Id. at 789.

The court went on to indicate that the period of limitations goes to the jurisdiction of the court.

Thus, prior to the Supreme Court's ruling in *Cook, supra,* there was no question but that the statute of limitations was a bar to prosecution. It was a jurisdictional issue. At issue was whether the government could adduce evidence establishing a statutory exception to the period of limitations.

This issue split the state courts, which division continued after *Cook*. In Illinois, the government was required to plead any statutory exception to the statute of limitations, otherwise the indictment was fatally defective. *Garrison* v. *People*, 87 Ill. 96 (1872). On the other hand, while agreeing that the statute of limitations is a bar to prosecution, New York did not require the government to plead exceptions, but allowed it to offer evidence on the issue at trial. *People* v. *Durrin*, 2 N.Y. Cr. R. 328 (1884).

United States v. *Cook*

At issue in 1872 was the *Watkins*, supra, question, i.e., may a defendant raise the statute of limitations by demurrer. The Supreme Court in *Cook, supra*, analyzed various rules of statutory construction and concluded that an indictment may not be quashed on this matter. 84 U.S. at 179. The rule announced was that a defendant may not raise the statute of limitations by demurrer, but must do so by special plea or evidence under the general issue, thereby allowing the government to introduce evidence concerning it. *Id.*

The Supreme Court thus adopted the "prima facie bar" of *White, supra*. It did not consider the nature of the statute of limitations, nor did it reject its status as a jurisdictional issue. The Court did refer to the statute of limitations as a "defense," but jurisdiction generally was considered a "defense" at this time. *Fitch* and *Bennett, supra.*

The above cited authorities commonly spoke of "bar" and "defense" in the same context. During this period, "defense" referred to a matter raised under the general issue, it did not *a fortiori* exclude jurisdictional questions.

Cook, supra, was a procedural case. It was recognized as such by its contemporaries. *People* v. *Durrin, supra.* In

Thompson v. *State,* 54 Miss. 740, 744 (1877), it was discused as a procedural case based upon the recognition that the statute of limitations presents a mixed question of law and fact which should not be decided without benefit of fact finding.

This view is consistent with other jurisdictional matters recognized as containing mixed questions of law and fact which were submitted to a jury for determination. *Wright* v. *United States,* 158 U.S. 232, 238 (1895).

Even *Cook's* specific holding that it is not necessary for an indictment to charge that the offense occurred within the applicable period of limitations has been rejected by some courts. *United States* v. *Gammill,* 421 F. 2d 185, 186 (10th Cir. 1970), *United States* v. *Benton and Co., Inc.,* 345 F. Supp. 1101, 1103 (M.D. Fla. 1972).

Federal Authorities—Generally

The Supreme Court spoke about the statute of limitations in *Biddinger* v. *Commissioner of Police,* 245 U.S. 128 (1917). At issue was the extradition of the defendant from New York to Illinois. In a federal habeas corpus petition, the defendant interposed the statute of limitations to block his return to Illinois. The court ordered that the defendant be returned to Illinois and stated that federal habeas corpus proceedings relating to extradition were very narrow in scope and did not allow for a factual hearing as to the applicability of the statute of limitations. *Id.* at 135.

The court went on to state, in dicta, that:

> The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases, *United States* v. *Cook,* 17 Wall. 168; and the form of the statute in Illinois, which the appellant seeks to rely

> upon, makes it especially necessary that the claimed defense of it should be heard and decided by the courts of that state. (citations omitted). *Id.* at 135.

This is consistent with the historical material. The *Biddinger, supra,* denomination of the statute of limitations as a defense does not mean that it is nonjurisdictional. In *United States* v. *White, supra* at 569, Chief Justice Cranch spoke of "whatever way the defendant presents his defense of limitations." He also stated it was a bar to prosecution.

What must be taken into account is the procedural distinction between issues of law and issues of fact which existed in our early jurisprudence. Purely legal issues could be raised by demurrer, but without any possibility of an evidentiary hearing. If determination of the issue required an evidentiary hearing, it could not be resolved by demurrer, but had to be considered as part of the general issue, i.e., as a "defense". That which propelled an issue to the status of a "defense" was not whether it was jurisdictional, but whether it required an evidentiary hearing.

Thus, when *Biddinger, supra,* states in dicta that the statute of limitations is a "defense" and cites *Cook,* all that is established is that the government is entitled to an evidentiary hearing on the question of the defendant's flight prior to the court ruling on the jurisdictional issue. Such hearing not being available in a narrow federal habeas corpus action, it was up to the Illinois authorities to have the hearing.[1]

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1. The Supreme Court cites *Biddinger* as authority for the proposition that the purpose of the extradition clause [18 U.S.C. § 3182] was to bring defendants "to trial as swiftly as possible in the state where the alleged offense was committed." *Michigan* v. *Doran,* 439 U.S. 282, 287 (1978).

At issue in *United States* v. *Harris,* 133 F. Supp. 796 (W.D. Mo. 1955), *aff'd. on other grounds,* 237 F. 2d 274 (8th Cir. 1956), was a defendant's motion to vacate a guilty plea as to certain counts. In granting his motion, the court reviewed the existing federal authorities on the statute of limitations and said "that those cases all rest on the principle announced in *United States* v. *Cook, supra,* that the prosecution must be allowed an opportunity, in meeting the defense of limitations, to show the existence of some exception to the rule." *Id.* at 798.

Judge Whittaker went on to find no exceptions to 18 U.S.C. § 3282 applicable to the case before him. He then held the limitation of § 3282 to be jurisdictional, *Id.* at 800, even though he had previously spoke of "the defense of limitations."

In reversing defendant's conviction, the Sixth Circuit dealt with a situation where, during certain periods, the United States Attorney did not present evidence to the grand jury either because of an injunction, or due to an agreement with defendant's counsel. After considering the policy underlying statutes of limitation, the Court stated:

> And the general rule is further that an indictment, found after the expiration of the time for beginning prosecution, is barred by the statute of limitations and is not waived by the fact that the prosecution was withheld on account of an agreement with the accused, or by the fact that the accused procured continuances of the preliminary hearing from time to time until the period of limitations had expired. (citations omitted).

Benes v. *United States,* 276 F. 2d 99, 108-109 (6th Cir. 1960). (considering 26 U.S.C. § 3748 (a)).

The court held that the agreement between the United States Attorney and the defendant did not toll the statute

of limitations, and that the prosecution was thus barred *Id.* at 109.

The Third Circuit appears at odds with itself as to the nature of the statute of limitations. A conviction for violating the Federal Election Campaign Act was reversed because the government had not met its burden of proof regarding prosecution within the limitations period in *United States* v. *Hankin*, 607 F. 2d 611 (3d Cir. 1979). The court relied upon *Waters* v. *United States*, 328 F. 2d 739 (10th Cir. 1964), *Chaifetz* v. *United States*, 288 F. 2d 133 (D.C. Cir. 1960), *rev'd. on other grounds* 366 U.S. 209 (1961), and *Askins* v. *United States*, 251 F. 2d 909 (1958) for the proposition "that the statute of limitations is a bar to the right of prosecution." *Id.* at 615.

Two years later, the Third Circuit dealt with whether a district courts' pretrial order denying a motion to dismiss an indictment on statute of limitations grounds may be the subject of an interlocutory appeal by the defendant. *United States* v. *Levine*, 658 F. 2d 113 (3d Cir. 1981). In holding that such interlocutory appeal was not appropriate, the court cited *United States* v. *Wild*, 551 F. 2d 418 (D.C. Cir.), 431 U.S. 916 (1977) and other cases to support dicta that the statute of limitations may be waived, *Id.* at 120 n.8, and inferentially, is nonjurisdictional.

The Third Circuit has followed both *Waters* and *Wild*, *supra*.[2] Yet these cases each represent the leading contemporary opinions on whether the statute of limitations is jurisdictional. *Waters* holds that it is jurisdictional, *Wild* that it is not. *Wild* specifically rejected the ruling in *Waters*. Thus, there is a split in the Third Circuit as to the nature of the statute of limitations.

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2. These cases are discussed in more detail later in this argument.

The Ninth Circuit, without analysis and supported by the dicta of *Biddinger* v. *Commissioner of Police, supra,* held that the statute of limitations is nonjurisdictional and subject to waiver. *United States* v. *Akmakjian,* 647 F. 2d 12, 14 (9th Cir. 1981), *cert. den.,* 454 U.S. 964, 102 S. Ct. 505 (1982). The Ninth Circuit therein considered the denial of a petition under 28 U.S.C. § 2255 filed four years after the entry of defendant's guilty plea. Prior to the acceptance of the guilty plea, the district court determined that defendant was aware that the statute of limitations was a possible defense, which he expressly waived in court. *Id.* at 13.

While not facing a statute of limitations question in *Vance* v. *Hedrick,* 659 F. 2d 447 (4th Cir. 1981), Haynsworth, J., writing for the court, did cite with approval *United States* v. *Wild, supra,* and reject the *Waters* v. *United States, supra,* line of authority. However, at issue was a federal habeas corpus action wherein the claimed procedural defect was characterized by the state court as jurisdictional. Specifically, a West Virginia recidivist statute required trial prior to the expiration of the term of court which is informed by the prosecution of the defendant's potential recidivist status.

In essence, West Virginia courts held that a trial court with subject matter jurisdiction may be divested of such jurisdiction due to the running of a statutorily fixed period of time. The Fourth Circuit declined to elevate this claim to a level consistent with federal habeas corpus relief.

Waters v. *United States,* 328 F. 2d 739 (10th Cir. 1964). is the leading federal case supporting the proposition that the statute of limitations is jurisdictional. It also controls the circuit wherein this prosecution originated.

Factually, the court considered a federal firearms conviction and a double jeopardy claim by the defendant. After

denying this claim, the Tenth Circuit considered the defendant's statute of limitations issue raised for the first time on appeal.[3] On its own initiative, the court considered "whether the statute is an affirmative defense, which must be originally pleaded on peril of waiver, as in civil cases, or whether it constitutes a constitutional bar to prosecution or punishment." *Id.* at 742.

The court reviewed the then existing authority, discussed the plain language of the statute, and said:

> If recognition of a distinction between the statute of repose in civil cases and the substantive bar in criminal cases, is to have any meaning in the administration of criminal justice, the statute of limitations must be held to affect not only the remedy, but to operate as a jurisdictional limitation upon the power to prosecute and punish. (citations omitted).

Id. at 743.

Defendant's conviction was reversed.

Second Circuit

The Second Circuit has apparently been consistent in its view that the statute of limitations is nonjurisdictional.[4] In *United States* v. *Parrino*, 203 F. 2d 284 (2d Cir. 1953), the court, after a procedural interpretation of *United States* v. *Cook, supra,* determined that the defendant's plea of guilty preempted the statute of limitations issue unless the defendant could establish some basis for withdrawing his plea of guilty.

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3. The statute of limitations under consideration in this case was 26 U.S.C. § 6531, which is essentially the same as 18 U.S.C. § 3282.

4. This apparent Circuit Court consistency has not always been shared by the Southern District of New York. See *United States* v. *DiStefano, infra.*

The next year, the foregoing holding was summarized by the Second Circuit in *United States* v. *Parrino,* 212 F. 2d 919, 922 (2d Cir. 1954), *cert. denied,* 348 U.S. 840 (1954):

> We do not overlook the comparison contention that the defendant, if he had elected to stand trial, might have escaped because of the Statute of Limitations. That defense addressed to the merits, was waived by his plea of guilty. And utterly no grounds appear in the record to support a contention that the waiver here was other than deliberate and intentional.[5]

Yet there exists an earlier *Parrino* case wherein Judge Hand stated: "It follows that, if three years pass after a kidnapping, an indictment is barred if the victim has been released "unharmed," within that period. We need not decide whether it would also be barred, if after that period the victim were released "unharmed." *United States* v. *Parrino,* 180 F. 2d 613, 615 (2d Cir. 1950).

Thus, in the first *Parrino* case, the statute of limitations was presumed to be a bar, *i.e.,* jurisdictional.

In following the later *Parrino dictates,* the Second Circuit held that an unqualified plea of guilty precludes consideration of a statute of limitations claim, which is not as fundamental as a jurisdictional claim. *United States* v. *Doyle,* 348 F. 2d 715, 718-719 (2d Cir. 1965), *cert. denied,* 382 U.S. 843 (1965).

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5. It is interesting to note that in 1829, Chief Justice Cranch in *United States* v. *Watkins, supra,* held that if, procedurally, the statute of limitations is raised at point A rather than point B, the government loses. In this *Parrino* case, the Second Circuit stated that if, procedurally, a defendant raises the statute of limitations at point C rather than point B, the defendant loses. In *United States* v. *Cook, supra,* the procedural dictates of *Watkins* were corrected.

Notwithstanding this line of Second Circuit authority, the Southern District of New York stated that it was without power to reinstate a dismissed indictment because the statute of limitations had run. *United States* v. *DiStefano,* 347 F. Supp. 422 (S.D.N.Y.), appeal dismissed (for lack of jurisdiction on unrelated grounds) 464 F. 2d 845 (2d Cir. 1972).

However, in *United States* v. *Sindona,* 473 F. Supp. 764 (S.D.N.Y. 1979), the court gave a broad interpretation to the Second Circuit's line of cases and stated that a defendant may waive the statute of limitations if such waiver is knowingly given with advice of counsel. *Id.* at 766.

While the court may have been correct in interpreting Second Circuit law[6], such law is based upon a procedural concept which is the mirror image of the one rejected in *United States* v. *Cook, supra.*

And, none of the Second Circuit authority is based upon specific ruling that the statute of limitations is anything other than jurisdictional. In fact, the historical precedents, followed by the states and some circuits, took as a given the jurisdictional nature of a statute of limitations.

D.C. Circuit

The earliest applicable decisions on the issue have previously been considered in the historical section. The basic

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6. The primary *Parrino* case relied upon, *United States* v. *Parrino,* 212 F. 2d 919 (2d Cir. 1954), has been characterized as an "aberration," *Strader* v *Garrison,* 611 F. 2d 61, 64 (4th Cir. 1979), and wrong, *United States* v. *Briscoe,* 432 F. 2d 1351, 1353-54 (D.C. Cir. 1970), citing 8A J. Moore, Federal Practice ¶ 32.07 [3b] at 32-80, in its principle proposition that deportability is only a collateral issue vis-a-vis an informed guilty plea.

theory of these precedents was followed in *Askins* v. *United States,* 251 F. 2d 909 (D.C. Cir. 1958), where a defendant, indicted for first degree murder, was convicted of a lesser included offense having a three year period of limitations. In setting aside the conviction, the court held that it was *without power* to act in cases barred by the statute of limitations.

The court in *Askins, supra,* at 913, purported to distinguish its ruling from a situation in which the statute of limitations is applicable to the original indictment. However, the differentiation is not consistent with the cited authority, *Id.* at 911, which holds state statutes of limitations to be jurisdictional. Nor is it consistent with the courts' subsequent opinion in *Chaifetz* v. *United States,* 288 F. 2d 133 (D.C. Cir. 1960), *rev'd on other grounds in part* and *cert. denied in part,* 366 U.S. 209 (1961).

In *Chaifetz, supra,* the defendant requested a lesser-included instruction as to a time-barred offense. The trial judge denied his request and the D.C. Circuit affirmed, reasoning that, even though requested by the defendant, and thereby inferentially acting as a waiver of the statute of limitations, the statute of limitations is not waivable and instructions must reflect the true state of the law. *Id.* at 136.[7]

Supporting its decision, the court in *Chaifetz* v. *United States, supra,* cited *Benes* v. *United States,* 276 F. 2d 99 (6th Cir. 1960) for the proposition that "a statute of limitations in a criminal case, unlike such a statute in civil

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7. In *Chaifetz,* the statute at issue was 26 U.S.C. § 3748(a) rather than 18 U.S.C. § 3282. However, there is no substantial difference between the provisions of either statute.

matters, is not merely a statute of repose but creates a bar to prosecution." 288 F. 2d at 135-136. It also noted its consistency with its prior ruling in *Askins* v. *United States, supra.*

Notwithstanding this long history, the D.C. Circuit in *United States* v. *Wild,* 551 F. 2d 418 (D.C. Cir. 1977), *cert. denied,* 431 U.S. 916, changed its position and held the statute of limitations to be nonjurisdictional and, thus, waivable.

At issue was an express waiver of the statute of limitations entered into between the defendant, through counsel, and the Watergate Special Prosecution Force. The waiver was requested by the defendant to allow his counsel to prepare the case and enter into plea discussions.[8] He was subsequently indicted.

In reaching its decision, the *Wild* court misinterpreted *United States* v. *Cook, supra,* and the use of "defense" in its procedural context. 551 F. 2d at 421-422. It held its position to be consistent with its prior rulings in *Askins* v. *United States, supra,* and *Chaifetz* v. *United States, supra,* and specifically rejected the positions of the Sixth and Tenth Circuits in *Benes* v. *United States, supra,* and *Waters* v. *United States,* 328 F. 2d 739 (10th Cir. 1964). 551 F. 2d at 422.

The panel then reviewed and adopted the Second Circuit authority, discussed in the previous section. Finally, the court stated:

> It seems to us, too, that if a defendant may waive certain constitutional rights, he should certainly be

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8. In this case, the Department of Justice asked MEEKER to execute a waiver, and then did not comply with its express provisions.

> capable in this instance of waiving a statutory right such as the statute of limitations. Constitutional rights which the defendant may waive include, *inter alia,* the right to be represented by counsel, the right not to be twice put in jeopardy, and the right to be tried in the district where the offense was committed. (Notes omitted.)

Id. at 424-425. But a flaw in this logic exists. A defendant's constitutional rights are personal and do not accrue until *after* a prosecution has been commenced. The statute of limitations deals with the power to initiate the prosecution *in the first instance.* This is the plain language of 18 U.S.C. § 3282: ". . . no person shall be prosecuted, tried or punished for any offense. . . ."

II.

STATE COURTS HAVE DECLARED THE STATUTE OF LIMITATIONS TO BE JURISDICTIONAL, A LIMITATION UPON THE POWER TO PROSECUTE.

As with early federal law, the state courts are generally in agreement that the statute of limitations is an absolute bar to prosecution and is jurisdictional.

In interpreting Nebraska law on review of a petition for habeas corpus, the Eighth Circuit, in a per curiam opinion, held that the trial court was without power to try a defendant if the offense charged was outside of the applicable statute of limitations. *Taylor* v. *O'Grady,* 113 F. 2d 798, 799 (8th Cir. 1940).

Some thirty years later, the issue remained so well-settled among the states that an Ohio appellate court was able to announce a universal rule that statutes of limitation "cannot be waived by failure to assert them." *City of Cleveland* v. *Hirsch,* 26 Ohio App. 2d 6, 268 N.E. 2d 600,

601 (1971). The court went on to cite authority from the Sixth Circuit, Arkansas, California, Florida, Idaho, Missouri, and North Dakota for the proposition "that a statute of limitations applicable to crimes is jurisdictional, and goes to the trial court's power to try the case." *Id.* at 602.

After specifically rejecting those federal cases holding the statute of limitations to be nonjurisdictional, the court stated that "[j]urisdiction cannot be conferred upon a court by any act or omission of the parties." *Id.*

In Florida, where the statute of limitations is also jurisdictional, a conviction based upon any such time barred offense is a nullity. *Holloway* v. *State,* 362 So. 2d 335 (Fla. App. 1978), *cert. den.* 379. So. 2d 953 (after accepting jurisdiction and hearing argument), *cert. den.* 449 U.S. 909 (1980).

This line of state authority supporting the proposition that the statute of limitations is jurisdictional continues. See, e.g., *State* v. *Stillwell,* 418 A. 2d 267 (N.J. App. 1980), holding it "to be jurisdictional and thus nonwaivable." *Id.* at 472. The court therein chronicles those cases, encyclopedic references, treatises, and law review comments on both sides of the issue.

III.

STRONG POLICY CONSIDERATIONS SUPPORT THE PRONOUNCEMENT OF THE STATUTE OF LIMITATIONS AS JURISDICTIONAL IN THE FEDERAL COURTS.

The statute of limitations in criminal cases is grounded on well established principles. Its primary purpose is to limit an individual's exposure to criminal prosecution to a specific period of time fixed by the legislature. The statute

of limitations is designed to bar the necessity of defending against facts obscured due to the passage of time. Also, it acts as a check on the executive to encourage prompt investigation and prosecution. *Toussie* v. *United States,* 397 U.S. 112, 115-116 (1970).

Mr. Justice White, speaking for the court in *United States* v. *Marion,* 404 U.S. 307, 322 (1971), stated that statutes of limitations "provide predictability by specifying a limit beyond which there is an *irrebutable presumption* that a defendant's right to a fair trial would be prejudiced." (Emphasis added).

In essence, the statute of limitations is a legislatively established limit imposed upon the executive. Congress determines at what point to fix the irrebutable presumption that bars executive action.

Clearly, it is arbitrary. Congress could have selected three years or six years. In 1829, noncapital offenses were subject to a two year statute of limitations. *United States* v. *Watkins, supra* at 470. That period was three years in 1940, 18 U.S.C. § 582, and in 1954 it was changed to five years. Pub.L. 87-299 § 1(a). Yet these were legislative exercises of discretion in fixing such arbitrary dates, such power having been granted to Congress. U.S. Const. Art. I, § 1.

The constraint imposed upon the executive was to prevent criminal prosecutions and convictions due to stale facts. *Toussie* v. *United States, supra.* Appellant's conviction in this case is an example of such staleness. The government's witnesses commented repeatedly about their difficulty in testifying accurately due to the passage of time, or testified in vague generalities.

A bar to prosecution is a jurisdictional matter which is not subject to waiver. It is beyond question that a court may not confer jurisdiction upon itself, nor may the litigants confer jurisdiction upon a court. *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167 (1939).

Finally, federal courts are courts of limited jurisdiction. They have only the power given them via valid Congressional enactments. 1 J. Moore, Moore's Federal Practice ¶ 0.60[3] (2d ed. 1976). The executive, either unilaterally or with the concurrence of another litgant, cannot extend the jurisdiction of a federal court. The executive may not substitute its judgment for that of Congress.

CONCLUSION

Petitioner presents a case of a defective waiver of the Statute of Limitations wherein there were no statutory exceptions to the time limit of 18 U.S.C. § 3282.

Although the *Cook* and *Biddinger* cases, decided many years ago, discussed when the Statute of Limitations question could be raised, no case decided by this Court has ever squarely dealt with the question of whether a defense based upon the prior expiration of the Statute of Limitations may be waived by the defendant. The Seventh Circuit, in ruling on petitioner's case, has said yes; the Tenth Circuit, in *Waters,* has said no, as have the sixth and one panel of the Third Circuit. The vast majority of state courts also have said no, the only result which would comport with the reasons for enacting a Statute of Limitations. The issue will surely be raised repeatedly in the years to come until it is settled by this Court. Defendants in criminal cases brought in the federal system will continue to be unsure as to the effect of past violations on their vulnerability to

prosecution. Lesser included offense instructions with differing periods of limitations will frequently address the nature of Statutes of Limitations. For each of the foregoing reasons, therefore, petitioner hereby prays that a hearing be granted.

Respectfully submitted,

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APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 82-2086

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY MEEKER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 CR 721—**Charles P. Kocoras,** *Judge.*

ARGUED JANUARY 18, 1983—DECIDED MARCH 3, 1983

Before BAUER, WOOD, and POSNER, *Circuit Judges.*

BAUER, *Circuit Judge.* Defendant Meeker was convicted of thirty-six counts of conspiracy to defraud the government, making false statements, and mail fraud. He was sentenced to concurrent terms of three years imprisonment on each count. On appeal the defendant asserts, among other claims, that the district court improperly refused to dismiss the indictment against him. The defendant claims that several counts were barred by the relevant statute of limitations and that another count was legally insufficient.

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I

A

At the time he was indicted, the defendant worked as manager of the student account center at Bell & Howell Schools, a subsidiary of Bell & Howell Company. The student account center serviced guaranteed loans under the Federal Insured Student Loan Program, 20 U.S.C. §§ 1071 to 1087-4 (1965), for students enrolled in the Bell & Howell vocational school system.

Under the federally insured loan program, Bell & Howell was required to make reasonable collection efforts when a student failed to make loan payments. 20 U.S.C. §§ 1078(a)(4), 1080. The collection schedule included a specific 120-day cycle of telephone calls and collection letters to the defaulting borrower. A default claim submitted by Bell & Howell Schools to the Department of Health, Education and Welfare (HEW) had to contain a record of due diligence detailing the collection efforts.

In 1975, Bell & Howell Schools' delinquent accounts receivable numbered in the thousands, representing millions of dollars. If Bell & Howell Schools could not collect these loans from the students, each account would have to be processed through the 120-day due diligence cycle before it could be submitted to HEW for payment. The cash flow problems and potential losses presented by the old accounts caused concern to Bell & Howell management.

The scheme developed by the defendant in late 1975 involved falsifying "due diligence" cards for submission to HEW. The defendant recruited a group of trusted employees to create the mendacious cards reflecting collection history. The employees forged dated entries detailing telephone calls that were never made and letters that were never sent. Additionally, the workers used different colored

pens, exchanged cards so that each card would contain different handwritings, and applied coffee and cigarette ashes to make the cards appear old.

The falsified due diligence cards were the bases for the false statement charges in the indictment. The Treasury checks mailed to Bell & Howell Schools in response to the default claims were the bases for the mail fraud charges.

B

A federal grand jury heard evidence regarding the investigation of Bell & Howell beginning in March 1981. Because the allegedly fraudulent activity occurred in 1975 and early 1976, the government was faced with losing potential criminal charges under the applicable five-year statute of limitations. 18 U.S.C. § 3282 (1961).[1]

To alleviate the immediate time pressures, the government executed short-term waivers of the statute of limitations with all targets of its investigation. The waivers were attractive to Bell & Howell, the defendant, and the other targets because the government needed time to review a large package of documents furnished by Bell & Howell which might have exonerated some of the targets, including the defendant. Each target separately executed a government-drafted limitations waiver in late July 1981. The

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1. The statute of limitations in 18 U.S.C. § 3282 (1961) provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

waiver covered the period August 17, 1976 through September 23, 1976.[2]

Two months later, government attorneys realized that they could not complete their investigation in time to present evidence to the next grand jury session scheduled for September 21-22, 1981. Therefore, on September 14 the government sought from all parties an additional, one-

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2. The waiver signed by the defendant and sent to the Department of Justice on July 30, 1981, stated in part:

> I have been advised by my attorney, Kenneth E. North, that should all target defendants concur, a final decision with respect to seeking criminal indictment in this matter will be delayed based upon an agreed tolling of the applicable statute of limitations. Therefore, I hereby waive a defense founded upon the statute of limitations for any offenses in connection with Bell & Howell FISL claims which allegedly occurred between August 17, 1976 through and including September 23, 1976. It is understood that this waiver does not preclude the Government from seeking an indictment prior to September 23, 1981. It is further understood that this waiver in no way bars or limits any defenses of any kind based upon due process grounds and associated with delay in bringing the indictment. It is further understood and agreed that the only offenses for which the statute of limitations waiver is applicable is [sic] those allegedly occurring between August 17, 1976 and September 23, 1976, and in no way extends or tolls the statute of limitations for any other or subsequent alleged offenses.
>
> I have discussed this matter with my attorney and fully understand the consequences of this waiver. No promises, representations or inducements of any kind other than those contained herein have been made to me or my counsel in connection with this waiver.

month waiver of the statute of limitations. All parties agreed immediately except the defendant, who insisted on drafting his own version of the waiver. The government and the defendant did not agree to the terms of that draft until September 18, and the government did not receive a copy of the defendant's waiver until September 21, the same day that the grand jury began its September session.

The defendant and a co-defendant were indicted on October 21, 1981. The co-defendant was acquitted of all charges.

II

In deciding that the issue whether a defendant was unjustly imprisoned because the state indictment was returned after the statute of limitations expired was not a proper basis for *habeas corpus* relief, the Supreme Court in 1917 stated, "The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases. . . ." *Biddinger v. Commissioner of Police,* 245 U.S. 128, 135 (1917). The Court relied on *United States v. Cook,* 84 U.S. (17 Wall.) 168, 178-79 (1872), to support its holding.

This long-standing precedent formed the basis of the District of Columbia Circuit's ruling in *United States v. Wild,* 551 F.2d 418 (D.C. Cir.), *cert. denied,* 431 U.S. 916 (1977), that criminal statutes of limitations do not create jurisdictional bars to prosecution. The *Wild* court considered whether the limitations period pertaining to illegal campaign contributions, 2 U.S.C. § 455(a) (Supp. V 1975), was a jurisdictional bar. The court reasoned that because the limitations defense must be raised affirmatively at trial, it could be waived. The court further noted that if a defendant may waive such constitutional rights as the right to be represented by counsel and the right to not be

put twice in jeopardy, he also must be able to waive rights under statutes of limitations. *Id.* at 424-25.

Other courts have adopted this view. *See, e.g., Vance v. Hedrick,* 659 F.2d 447 (4th Cir. 1981), *cert. denied,* 102 S. Ct. 2246 (1982); *United States v. Levine,* 658 F.2d 113 (3d Cir. 1981); *United States v. Akmakjian,* 647 F.2d 12 (9th Cir. 1981), *cert. denied,* 102 S. Ct. 505 (1982); *United States v. Doyle,* 348 F.2d 715 (2d Cir.), *cert. denied,* 382 U.S. 840 (1965); *United States v. Sindona,* 473 F. Supp. 764 (S.D.N.Y. 1979); *but see United States v. Hankin,* 607 F.2d 611 (3d Cir. 1979) (this case not discussed in *Levine, supra*); *Waters v. United States,* 328 F.2d 739 (10th Cir. 1964). In addition, two noted authorities on federal procedure agree that such a statute of limitations may be waived. 8 J. Moore, Moore's Federal Practice ¶ 12.03[1], at 12-17, 18 (2d ed. 1976); 1 C. Wright, Federal Practice And Procedure, § 193, at 409-10 (2d ed. 1969).

The defendant nevertheless urges that this statute of limitations, 18 U.S.C. § 3282 (1961), poses a jurisdictional bar to prosecution. We disagree. More than 100 years ago the Supreme Court suggested that a defendant in a criminal action must affirmatively assert the limitations defense. A great majority of today's courts have adopted that position; we believe it to be correct.

This circuit has not yet ruled directly on the issue. Hoewever, the defendant notes that this court once wrote: "A plea of the statute of limitations is a plea in bar and should be presented to and passed upon by the trial court." *United States v. Franklin,* 188 F.2d 182, 186 (7th Cir. 1955). That statement is not inconsistent with the position we embrace here. The *Franklin* court acted in response to the government's contention that the defendant

was raising his limitations defense for the first time on appeal and that, therefore, the court should not consider that defense. The court agreed. A "plea in bar" is not a jurisdictional bar, but rather an affirmative defense that absolutely defeats a plaintiff's claim.

Two lines of authority fortify this interpretation of *Franklin*. *First,* in support of its holding the *Franklin* court cited *United States v. Kaiser,* 138 F.2d 219 (7th Cir. 1943), *cert. denied,* 320 U.S. 801 (1944), where the court held "that an appellate court will review only questions brought to the attention of the trial court and upon which the trial court has made a ruling." *Id.* at 220. This is not the standard applicable to jurisdictional issues. Second, several courts have cited *Franklin* for the antithesis of the defendant's position. Those courts held that time bars are in fact defenses at trial and not jurisdictional. *United States v. Williams,* 684 F.2d 296, 299 (4th Cir. 1982); *United States v. Walden,* 253 F.2d 551, 558 (3rd Cir.) *cert. denied,* 356 U.S. 973 (1958) (*per curiam* opinion denying petition for rehearing); *Askins v. United States,* 251 F.2d 909, 913 (D.C. Cir. 1958).

It appears that only the Sixth and Tenth Circuits currently retain the view that the statute of limitations is a jurisdictional bar in criminal actions. The Sixth Circuit's position was stated thirteen years ago in dictum. *Benes v. United States,* 276 F.2d 99, 108-09 (6th Cir. 1960). The Tenth Circuit relied on *Benes* in formulating its position in 1964. *Waters v. United States,* 328 F.2d 739, 742-43 (10th Cir. 1964). The District of Columbia Circuit rejected *Benes* as unreliable in its thorough analysis of the issue in *Wild,* 551 F.2d at 422 n.8. We agree with the D.C. Circuit; the *Williams-Wild* line of cases enunciates the sounder view.

Our holding is consonant with the Supreme Court's view of the purpose underlying statutes of limitations governing criminal laws. The Court in *Toussie v. United States,* 397 U.S. 112, 114-15 (1970), stated:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.

See United States v. DiSantillo, 615 F.2d 128 (3d Cir. 1980). The purposes of a time bar are not offended by a knowing and voluntary waiver of the defense by the defendant.[3]

III

The defendant's other major claim is that the district court erred in not dismissing the conspiracy count of the indictment for failure to allege that the defendant committed an overt act in furtherance of a conspiracy.

We recognize that the government must prove the commission of an overt act to secure a conspiracy conviction. *United States v. Anderson,* 542 F.2d 428 (7th Cir. 1976). The defendant concedes that the government proved such

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[3] The defendant raises other minor issues regarding his waiver. The district court dismissed these claims when they were presented in pretrial and post-trial motions. We affirm. The issues do not merit thorough discussion; we note only that the defendant was not adversely affected in any way by any alleged breach of agreement by the government.

an act at trial. His argument is that reversal is required because the overt act was inadequately charged.

The conspiracy count specifies seventeen overt acts. The defendant relies on his statute of limitations defense to invalidate overt acts one through fourteen, which all occurred before or during the period covered by the first waiver. For overt acts fifteen through seventeen, the defendant argues that the acts alleged were merely "caused," and not "committed," by the defendant. That, the defendant argues, is insufficient to sustain a charge of conspiracy. Because we have rejected the defendant's argument that he could not waive the statute of limitations, we consider all of the seventeen overt acts in determining whether the conspiracy count was vaild.

We believe that the indictment adequately alleged an overt act. Counts eight through twelve, for example, allege that the "defendants did submit and cause to be submitted . . . default claim[s] . . . to the U.S. Department of Health, Education & Welfare . . . ." These allegations satisfy any requirement for pleading overt acts. We do not need to probe any further into the sufficiency of the seventeen allegations.[4]

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[4] The overt acts illustrated in the text conclusively defeat the defendant's claim. We note, nevertheless, that overt acts fifteen through seventeen, which allege that "the defendants caused to be delivered by the U.S. Postal Service to the Bell & Howell Industrial Bank . . . U.S. Treasury Check[s] . . . .", satisfy overt act pleading requirements. *See, e.g., Davis v. United States,* 86 F.2d 45 (5th Cir. 1936), *cert. denied,* 300 U.S. 657 (1937) ("Overt acts need not be pleaded with the fullness that would be necessary if they were themselves charged as crimes."); *United States v. McClarty,* 191 F. 518 (W.D. Ky. 1911) ("[T]he conspirator must himself 'do' the 'act' or give authority to another to do that particular thing for him.")

IV

The statute of limitations relevant to this action does not pose a jurisdictional bar to prosecution. The defendant voluntarily and knowingly executed a valid waiver of that statute. Therefore, the acts falling within the time period encompassed by the waiver were validly charged in the indictment. Moreover, the indictment sufficiently alleged overt acts committed in furtherance of a conspiracy to defraud the government. Accordingly, the district court's judgment of conviction is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 13, 1983

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

No. 82-2086

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JERRY MEEKER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 CR 721

Charles P. Kocoras, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendant-Appellant Jerry Meeker, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

EXHIBIT C

No. 82-2048

In the Supreme Court of the United States

OCTOBER TERM, 1983

JERRY MEEKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner waived a statute of limitations defense by executing express waivers of that defense prior to the expiration of the limitations period.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2048

JERRY MEEKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 701 F.2d 685.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1983. A petition for rehearing was denied on April 13, 1983 (Pet. App. A11). The petition for a writ of certiorari was filed on June 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiracy to defraud the government, in violation of 18 U.S.C. 371 (Count 1), 13 counts of making false statements, in violation of 18 U.S.C. 1001

(Counts 2 through 14), and 23 counts of mail fraud, in violation of 18 U.S.C. 1341 and 2 (Counts 21 through 43). Pet. App. A1.[1] Petitioner was sentenced to concurrent terms of three years' imprisonment on each count (*ibid.*). The court of appeals affirmed (*id.* at A1-A10).

1. The evidence at trial (see Pet. App. A2-A3) showed that in 1975 petitioner worked as a manager of the student account center at Bell & Howell Schools, a subsidiary of the Bell & Howell Company. The student account center serviced loans guaranteed under the Federal Insured Student Loan Program, 20 U.S.C. 1071 *et seq.*, for students enrolled in the Bell & Howell vocational school system. Under the loan program, Bell & Howell was required, before it submitted a default claim to what was then the Department of Health, Education, and Welfare, to make reasonable collection efforts in the case of a student who failed to make loan payments. The collection schedule included a 120-day cycle of telephone calls and collection letters to the defaulting borrower.

By 1975, Bell & Howell Schools had accumulated thousands of delinquent accounts receivable representing millions of dollars in defaulted loans. These accounts presented cash flow problems and a potential for loss that caused concern to Bell & Howell management. Compliance with the 120-day "due-diligence" cycle prior to submission of the delinquent accounts to HEW would have exacerbated those problems. In late 1975 petitioner developed a scheme whereby Bell & Howell employees would create false "due diligence" records for submission to HEW. Petitioner and other employees forged entries describing telephone calls that were never made and letters that were never sent. In

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[1]Petitioner's co-defendant Nicholas Dennis was acquitted on the same counts. Prior to trial, the district court granted the government's motion to dismiss Counts 15 through 20 of the indictment.

order to create the impression that each card contained entries by different persons, petitioner and the others used different colored pens and exchanged cards as they made the entries. They then used coffee stains and cigarette ashes to make the cards appear old.

2. In March 1981, a federal grand jury began to hear evidence on the fraudulent activity at Bell & Howell. The government faced the risk of having to forgo some potential criminal charges in connection with offenses that had occurred between August 17, 1976, and September 23, 1976, because of the imminent running of the five-year limitations period prescribed by 18 U.S.C. 3282. Accordingly, the government requested each target of the investigation to execute a waiver of the statute of limitations until September 23, 1981; in July 1981 each of the targets, including petitioner, signed such a waiver. The waivers were attractive to petitioner and the other targets because the government needed time to review Bell & Howell documents that might have exonerated some of the targets. On September 14, the government sought an additional one-month waiver from the targets because it needed more time to present its case to the next grand jury session scheduled for September 21-22, 1981. All of the targets signed waivers drafted by the government, except petitioner, who drafted his own version of the waiver. The government received a copy of petitioner's waiver on September 21, the day the grand jury began its September session. Petitioner was indicted on October 21, 1981. Pet. App. A3-A5.

Prior to trial petitioner sought to renounce his waiver on the ground that he never received an executed copy of the second waiver he delivered to the government.[2] The district

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[2]Petitioner orally agreed to the substance of the second waiver on September 18 (Pet. App. A5). The United States Attorney then arranged for an agent to retrieve the executed waiver from petitioner's attorney on September 21, prior to the commencement of the

court concluded that petitioner's waiver was effective, since he had received the benefit of the agreement, which allowed the grand jury more time to consider documents that could have exonerated petitioner. The court concluded that the government's "administrative oversight" in failing to sign the waiver in no way prejudiced petitioner (Mar. 22, 1982, Tr. 21-23).

3. The court of appeals affirmed petitioner's convictions (Pet. App. A1-A10). It rejected his contention that the statute of limitations poses a jurisdictional bar to prosecution and concluded that he had knowingly and voluntarily waived the defense in connection with the counts that might have been affected (*id.* at A5-A8, A10). In addition, the court concluded that the indictment adequately alleged an overt act in connection with the charge of conspiracy to defraud the government (*id.* at A8-A9). The court also noted (*id.* at A8 n.3) that petitioner was not adversely affected in any way by the alleged government breach of agreement in connection with the second waiver.

ARGUMENT

Petitioner contends (Pet. 4-23) that some of his convictions should be set aside on the ground that they were barred by the five-year statute of limitations, 18 U.S.C. 3282. Despite the fact that he executed formal waivers, petitioner urges that those waivers are ineffective because the statute of limitations operates as a "jurisdictional" bar to prosecution. The court of appeals properly rejected this claim, and no further review is warranted.

September grand jury session. The agent was unaware that petitioner's attorney had added a clause stating that a copy of the waiver was to be signed and returned to petitioner's attorney before October 1, 1981. Thus, the agent simply placed the waiver in the investigative file.

1. We note at the outset that even if the petition presented an issue worthy of this Court's consideration, this would be an entirely inappropriate case in which to grant review. Petitioner acknowledges that only 14 of the counts on which he was convicted would be affected by the contention he raises. Because he received concurrent three-year terms of imprisonment on close to 40 counts, the Court's disposition of the petition will not affect the length of petitioner's sentence. For that reason alone, review is not appropriate. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969).

2. In any event, the contention that the statute of limitations is a jurisdictional bar to prosecution has been presented to the Court on several occasions in recent years, and the Court has denied certiorari on each occasion. See *Williams* v. *United States*, No. 82-5411 (Jan. 10, 1983); *Akmakjian* v. *United States*, 454 U.S. 964 (1981); *Wild* v. *United States*, 431 U.S. 916 (1977).[3] Thus, petitioner's contention appears to be of insufficient importance to warrant review.

Moreover, the decision of the court of appeals is correct. A number of courts have held that a defense based on the statute of limitations is waivable, either expressly or by failure to raise it in timely fashion at or before trial. See, *e.g.*, *United States* v. *Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982), cert. denied, No. 82-5411 (Jan. 10, 1983); *United States* v. *Akmakjian*, 647 F.2d 12, 14 (9th Cir.), cert. denied, 454 U.S. 964 (1981); *United States* v. *Wild*, 551 F.2d 418, 422 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); *United States* v. *Kenner*, 354 F.2d 780, 785 (2d Cir. 1965), cert. denied, 383 U.S. 958 (1966); *United States* v. *Franklin*, 188 F.2d 182, 196 (7th Cir. 1951); *Capone* v. *Aderhold*,

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[3]A similar contention is pending before the Court now in *Walsh* v. *United States*, No. 82-2043.

65 F.2d 130 (5th Cir. 1933). See also *Holloway* v. *Florida*, 449 U.S. 905, 908-909 n.5 (1980) (Blackmun, J., dissenting from denial of certiorari); *Vance* v. *Hedrick*, 659 F.2d 447, 452 (4th Cir. 1981), cert. denied, 456 U.S. 978 (1982); *United States* v. *Levine*, 658 F.2d 113, 120 (3d Cir. 1981); 1 C. Wright, *Federal Practice and Procedure* § 193 at 705-708 (2d ed. 1982); 8 J. Moore, *Federal Practice* para. 12.03[1] at 12-17 to 12-18 (1982).[4]

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[4]Several cases suggest that this Court regards the statute of limitations as an affirmative defense and not a jurisdictional requirement. See *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917) (declining to consider statute of limitations in habeas corpus proceeding on the ground that it is a defense and must be asserted at trial in the state courts); *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 178 (1872) (holding that criminal statute of limitations could not be raised by demurrer to the indictment). Cf. *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887) (noting in the context of a civil case that the statute of limitations generally can be waived by the parties).

The Tenth Circuit, in the context of a tax prosecution, has concluded in *Waters* v. *United States*, 328 F.2d 739, 742-743 (1964), that the statute of limitations is "jurisdictional" and therefore not waived when not raised at trial. Cf. *Benes* v. *United States*, 276 F.2d 99, 108-109 (1960), in which the Sixth Circuit, also in a tax case, concluded that a statute of limitations creates a bar to prosecution that cannot be waived by agreement of the parties. Neither *Waters* nor *Benes* involved circumstances similar to those in this case. It is unclear whether those cases would be decided in the same manner today. Cf. Note, *Waiver of the Statute of Limitations in Criminal Prosecutions:* United States *v.* Wild, 90 Harv. L. Rev. 1550, 1553-554 (1977); Note, *The Statute of Limitations in a Criminal Case: Can It Be Waived?*, 18 Wm. & Mary L. Rev. 823 (1977). Since *Waters*, this Court has denied certiorari in several cases involving this issue (see page 5, *supra*), and there is no reason to do differently here. If future cases suggest that *Waters* and *Benes* are still regarded as good law in their respective circuits, the Court can consider at that point whether review is appropriate.

In *United States* v. *Hankin*, 607 F.2d 611 (3d Cir. 1979), also cited by petitioner (Pet. 12), it is unclear whether the statute of limitations defense was raised at trial. In any event, the Third Circuit has made clear in the more recent case of *United States* v. *Levine*, *supra*, that it views the statute of limitations as subject to waiver.

There can be no doubt that petitioner in fact waived his statute of limitations defense. He executed an explicit and limited written waiver after consultation with counsel. See Pet. App. A4 n.2. Execution of the waiver was to petitioner's benefit because it was for the purpose of allowing prosecutors to review Bell & Howell documents that might have exonerated petitioner and other potential defendants. See *id.* at A3. Petitioner himself participated in drafting an additional one-month waiver and negotiated with the government about its terms (*id.* at A5). It is difficult to imagine a clearer instance of an effective waiver of a statute of limitations defense.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

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[5]Compare *United States* v. *Wild, supra,* 551 F.2d at 423-425. Petitioner appears to suggest in his statement of facts (Pet. 3-4) that his waiver became invalid because of the government's failure to sign and return to his counsel a copy of the second waiver. The court of appeals properly upheld the district court's ruling that the waiver was valid and that petitioner was not prejudiced in any way by the government's failure to sign the waiver (Pet. App. A8 n.3, A10).

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